

PART II

SOME LESSONS FROM THE PAST

The Custom Of London

Before looking at the case-law, we must delve into the past. Some attention must be given to two particular instances of restraint on a husband's inter vivos transfers. I refer to the custom of London and to inchoate dower. A knowledge of both institutions is needed if we are to grasp all the implications of the case-law. Moreover, it should help to disabuse us of any notion that the statutory share is sacrosanct. Reverence for the home and the family naturally inspires affection for the legal institutions that protect the family. We should guard against these becoming enshrined in their own right. Changes in this field cannot and should not be made overnight; but history reveals that these protective institutions may in time lose touch with prevailing realities.

I. NATURE OF THE CUSTOM

The early English will,¹ which dealt only with personalty, was subservient to the claims of the family. I speak of the latter half of the 12th century, the time of Glanville, which for the layman may roughly be identified with the days of chivalry, of Ivanhoe, Robin Hood, Richard the Lion-Hearted, and the Third Crusade. By that period the surviving wife and children had protection which bears a striking resemblance to the modern American statutory share. Some-

¹ On pre-conquest institutions, we grope for knowledge. Toward the end of the Anglo-Saxon period a union of the post obit gift (gift after death) and the *verba novissima* (death-bed statement) produced an embryonic "testament" of personalty, called the *cwide* (written statement). Pollock and Maitland doubt its similarity to the modern will; see 2 Pollock and Maitland, *HISTORY OF ENGLISH LAW* 319-21 (2nd ed. 1905). Page is not so dubious; see 1 Page, *WILLS* 23-33 (3rd ed. 1941). The pattern is less discernible in restrictions on testation; see Pollock and Maitland, *op. cit. supra* at 394.

times known as the "legitim," it is commonly referred to today as the custom of London, having survived in that city longer than elsewhere. Under the custom of London a testator, leaving a surviving wife and children,² could not dispose of more than one third of his personal property. One third was the "wife's part," one third the "child's part" ("bairn's part" in Scotland), and the other third the "dead's part."³ One half could be disposed of if the wife was the sole survivor; likewise if the children alone survived. This protection to the widow was thoroughly entrenched. At the beginning of the next century it received incidental recognition in the Great Charter at Runnymede.⁴ There is even some authority to the effect that if her husband consented the widow could dispose of her interest by will.⁵

Enforcement originally was by means of the common-law writ *de rationabili parte bonorum*. In the thirteenth century, however, the church obtained jurisdiction over things testamentary, an assignment that was to last for some six hundred years until its jurisdiction in civil matters was removed in 1856. For all practical purposes the everyday jurisdiction over the "reasonable parts" soon went to the ordinary; the common-law writ became a thing of only occasional use.⁶ Suit would be brought in the church courts against the executor, the man with the "goods."

Whence came this custom?⁷ It is not clear. We are told

² Mary Bateson, editor of 21 PUBLICATIONS OF THE SELDEN SOCIETY: BOROUGH CUSTOMS, states (introd. xcvi-ii) that it was not until the time of Bracton that the children received a third; until then the heir (eldest son) took all of the third. She writes of borough customs, but it is of course possible that the "law of the land" in those early times was comprised substantially of borough customs and like imitations thereof.

³ 2 Pollock and Maitland, *op. cit. supra* note 1, at 348.

⁴ MAGNA CARTA Chap. 26 (1215), cited in 2 Pollock and Maitland, *op. cit. supra* note 1, at 350. But the common law courts did not always feel that the reference in Magna Carta amounted to an express sanction of the custom, *id.*, at 355.

⁵ 3 Holdsworth, HISTORY OF ENGLISH LAW 550 (6th ed. 1934).

⁶ Pollock and Maitland, *op. cit. supra* note 1, at 352.

⁷ The child's part was subject to advancements, at least those made on the marriage of the child. *Jenks v. Holford*, 1 Vern. 61, 21 Eng. Rep. 151 (Ch. 1682). It could also be barred, if the child was of age, for

that it probably has no known Anglo-Saxon or Norman antecedents.⁸ From here on in we have supposition. It is easy to generalize on the origin of legal institutions and doctrines; but the tracing process too often proceeds from doubtful premises to the attractive conclusion. Whether the custom originated solely or in part in local custom, in Roman Law,⁹ in ancient family rights,¹⁰ in a notion of community of goods between husband and wife,¹¹ or from other sources, we cannot be sure. We can only speculate. The significant thing is that

valuable consideration. *Lockyer v. Savage*, 2 Eq. Ca. Abr. 272, 22 Eng. Rep. 230 (Ch. 1733). The custom did not apply to grandchildren. *Fowke v. Hunt*, 1 Vern. 397, 21 Eng. Rep. 953 (Ch. 1686); *Northey v. Strange*, 1 P. Wms. 341, 24 Eng. Rep. 416 (Ch. 1716). A jointure of land would, if so stated, have the effect of barring the widow's customary share, as well as dower. This was not regarded as "breaking into the custom; for the freeman might at any time during his life, even in his last sickness, have invested his personal estate in the purchase of land, which would defeat the custom and stand good [citing *Frederick v. Frederick*, 1 P. Wms. 711 (Ch. 1721)] though the freeman should at the same time have said, that he did this on purpose to defeat the custom. And as this (if the purchase was real) would have held good to bar the custom, surely the case could not be worse, where such agreement for making the purchase was for a valuable consideration, and part of the marriage articles." *Parker, L. C.*, in *Babington v. Greenwood*, 1 P. Wms. 530, 532-3, 24 Eng. Rep. 503 (Ch. 1718); also see *Hancock v. Hancock*, 2 Vern. 665, 23 Eng. Rep. 1033 (Ch. 1710).

A premarital settlement of personalty, without mentioning the custom, was held to be in bar of the custom in *Lewin v. Lewin*, 3 P. Wms. 15 (Ch. 1727); regarding land, see *Hancock v. Hancock*, *supra*. The share under the custom was subject to the testator's debts. *Rider v. Wagner*, 2 P. Wms. 328, 335 (Ch. 1725).

"If a Freeman of London dies without issue, his wife is intitled by the custom of the moiety of her Husband's personal Estate in value, but not in Specie." *Kitson v. Robins*, 2 Eq. Ca. Abr. 555, 22 Eng. Rep. 466-67 (1709).

⁸ Pollock and Maitland, *op. cit. supra* note 1, at 349. *But see* Bateson, *op. cit. supra* note 2, at xcvi-ii: "That the division in thirds was known to the Normans cannot be doubted; it is established on evidence more complete than that which vouches for its existence among the Anglo-Saxons; the probability, however, is that it was a custom common to both races." Miss Bateson was a disciple of Maitland's, and her statement was made in 1906, a year after publication of Pollock and Maitland's HISTORY OF ENGLISH LAW.

⁹ There appears to be no definite evidence. In general, on the Roman institutions, see pp. 279-281, *infra*.

¹⁰ *But cf.* notes 2, 8, *supra*.

¹¹ Pollock and Maitland, *op. cit. supra* note 1, at 349. But we are told later in the same volume that English law at an early date refused to adopt the custom of community. *Id.* at 402.

it existed, and on a national scale. It continued on a country-wide basis until early in the fourteenth century¹² and in a substantial part of the country until the close of the seventeenth century.¹³

2. REASONS FOR OBSOLESCENCE

Why did the custom linger longer in some parts of the country, and why in the end did it fade away? The answer to the first question probably lies in the variations in practice in the different ecclesiastical courts.¹⁴ But the reasons for the disappearance of the custom are largely a matter of conjecture.¹⁵ Our sketchy knowledge of the custom is re-

¹² 3 Holdsworth, *HISTORY OF ENGLISH LAW* 552 (6th ed. 1934). Although its universal application ended in the fourteenth century, it would appear that the tripartite arrangement continued as a plan of intestate succession for some time thereafter.

¹³ It continued in the northern province of York until abolished in 4, 5 Wm. & Mary, Chap. 2 (1692); see also 3 Anne, Chap. 5 (1703); in Wales until 1696 (7, 8 Wm. 3, Chap. 38) and in London in 1734 (11 Geo. I, Chap. 18). Joseph Gold, in "Freedom of Testation, the Inheritance (Family Provision) Bill," 1 *MOD. L. REV.* 296, 298 (1938), says that the custom apparently survived in Chester until 1925. *But cf.* Burn, *op. cit. infra*, note 15, at 584, who states that the custom of York did not extend to Chester. And see the remarks of the Master of the Rolls in *Pickering v. Stamford*, 3 Ves. Jr. 332, 337-38, 30 Eng. Rep. 1038, 1041 (1797), referring to the case of a testator who apparently had thought that his wife was entitled to a forced share of his personalty: "There may be some reason for it; for he lived in the county of Cheshire, which is part of the province of York; and a vulgar error prevailed, that the custom of York goes through the whole province. The Legislature [*i.e.*, Act of 1692] themselves fell into it by reserving to the citizens of York and Chester the customs of those cities; the latter of which has no custom. When by another act [Act of 1703] they repealed that as to the city of York, they left Chester just as it was by the first act. That custom of York, never attached upon any part of the province, that was not so at the time of Henry VIII; and Chester was annexed since that period." Also see 1 Bright, *HUSBAND AND WIFE* 302 (1850).

¹⁴ 3 Holdsworth, *op. cit. supra* note 5, at 554-56.

¹⁵ We can sympathize with Burn's tongue-clucking over an early text writer's discussion of the statute that ended the custom in London: "But with regard to the city of London, by some fatality, he hath recited the statute—so imperfectly, that if he did understand it himself, it is impossible the reader should understand it from his manner of expressing it; but it is plain he did not understand it. . . ." 4 Burn, *ECCLESIASTICAL LAW* 566 (9th ed. 1842).

flected in the variety of these conjectures. Pollock and Maitland¹⁶ refer to the indifference of both spiritual and temporal courts, and to the fact that the church would gain legacies by restoring freedom of testation.¹⁷ Holdsworth¹⁸ feels that the common-law lawyers were concerned with the logical inconsistency between giving the husband title to the wife's personalty and restricting the right of testation; and that these views would naturally be of more influence in the southern province. Burn¹⁹ finds the explanation in the improved position of the younger children. Rheinstein speculates on the inconvenient delays in settlement of estates that would be involved in continuing a forced share for children: in an age of colonial expansion and slow communications, this might tie up administration for some years.²⁰ Possibly the longest view is that taken by Unger, who traces the decline of the custom to the "improved system of intestate succession"²¹ available to that part of the country which did not follow the custom. The implications of Unger's thesis have been dealt with earlier.²²

Probably each of these circumstances was a contributing factor. It would appear that its obsolescence was inevitable. Restrictions on wills of personalty were becoming unpopular. In particular, the City of London was finding that many men of substance, living and doing business in the City, were refusing "to become freemen of the same, by reason of an ancient custom with the said city, restraining the citizens and freemen of the same from disposing of their personal estates by their last wills and testaments."²³ And the spirit of the

¹⁶ *Op. cit. supra* note 1, at 355.

¹⁷ And see Dainow, "Limitations on Testamentary Freedom in England," 25 CORNELL L. Q. 337, 342-44 (1940).

¹⁸ *Op. cit. supra* note 5, at 554-56.

¹⁹ *Op. cit. supra* note 15, at 564-66.

²⁰ Rheinstein, CASES ON DECEDENTS' ESTATES 59-60 (2d ed. 1955).

²¹ Unger, "The Inheritance Act and the Family," 6 MODERN L. REV. 215, 220-22 (1943).

²² Discussed, *supra* p. 41.

²³ Recited in 11 Geo. I, c. 18 §1(1724).

time was intolerant of curbs on the individual.²⁴ England in the sixteenth and seventeenth centuries was on the march, economically and politically. The beheading of Charles I was but a startling symbol of the new liberty in affairs, in ideas. When "England set the world ablaze," the rise of empire not only necessitated but also stimulated a free field for the self-reliant.

3. CASE LAW

The cases under the custom of London portray a determined judicial enforcement of the basic protective policy. The plaintiff succeeded in practically all reported cases. The grounds for attack were more extensive than under the modern statutory share cases. The popular test merely required the plaintiff to prove that the transferor "had not entirely dismiss [sic] himself" ²⁵ of the property in his lifetime. Thus in *Smith v. Fellows* ²⁶ a reservation of the rents and profits in a voluntary deed of a leasehold impelled the court to declare that the property "still continued in . . . the husband, and of consequence is subject to the custom." ²⁷ We shall see later that such a transfer will usually be upheld, as against the widow's claim, under the prevailing American

²⁴ Cahn, "Restraints on Disinheritance," 85 U. PA. L. REV. 139, 140 (1936). Cahn expresses disbelief of the theory that the "continual incursions of the Scots" accounted for the long survival of the custom in the province of York. For a' that an' a' that, at least one other legal institution may be laid to the blue bonnets that came over the border: ". . . in the marches of Scotland some hold of the King by cornage, that is to say, to winde a horne, to give men of the countrie warning, when they heare that the Scots or other enamies are come or will enter into England." 1 Co. Lit.* 106 b. See also *Pusey v. Pusey*, 1 Vern. 273, 23 Eng. Rep. 465 (1684).

²⁵ *Turner v. Jennings*, 2 Vern. 612, 23 Eng. Rep. 1000 (1708).

²⁶ *Smith v. Fellows*, 2 Atk. 62, 26 Eng. Rep. 435 (1740).

²⁷ *Id.* at 63; *accord*, *Hall v. Hall*, 2 Vern. 277, 23 Eng. Rep. 779 (1692), where the court stated that if "[the husband] has it in his power, as by the keeping of the deed . . . or if he retains the possession of the goods, or any part of them, this will be a fraud upon the custom." Strong dicta to the same effect may be found in *Tomkyns v. Ladbroke*, 2 Ves. Sen. 591, 28 Eng. Rep. 377 (1755); also see *Randall v. Willis*, 5 Ves. Jr. 262, 276, 31 Eng. Rep. 577, 586 (1800) (marriage settlement case).

case-law.²⁸ Factors that help the plaintiff under the modern statutory share cases *a fortiori* received a like or stronger emphasis in the cases under the custom. Thus proximity to death²⁹ and the proportion of the total holdings that were transferred *inter vivos*³⁰ are important, though perhaps not decisive,³¹ criteria. One cryptic case under the custom, *City v. City*,³² purports to say that a voluntary assignment, neither possession nor "interest" being retained, would be vulnerable to the wife's claim, and has been cited for this startling proposition, without comment, by some American authorities.³³

²⁸ *Infra*, pp. 184-186. American cases that discuss the custom of London, directly or inferentially, include the following: *Ford v. Ford*, 4 Ala. 142 (1842); *Tucker v. Tucker*, 29 Mo. 350 (1860), 32 Mo. 464 (1862); *Stone v. Stone*, 18 Mo. 392 (1853); *McLaughlin v. McLaughlin*, 16 Mo. 242 (1852); *Walker v. Walker*, 66 N.H. 390, 31 Atl. 14 (1891); *McCannon v. Summons*, 2 Disn. 596 (Ohio 1859); *Norris v. Barbour* 188 Va. 723, 51 S.E.2d 334 (1949); *Gentry v. Bailey*, 47 Va. (6 Gratt.) 594 (1850); *Lightfoot v. Colgin*, 19 Va. (5 Munf.) 42 (1813); *cf.* *Crain v. Crain*, 17 Tex. 80 (1856) (forced share of children).

²⁹ In *Turner v. Jennings*, 2 Vern. 612, 23 Eng. Rep. 1000 (1708) the court said that a husband's transfer in trust, retaining life estate in "the greatest part of his personal estate . . . when he was languishing, and but a little before his death, . . . ought to be looked upon as a donatio causa mortis [and] that either the custom must be entirely given up, or this deed must be looked upon, as made in fraud of the custom . . ."; also see *Tomkyns v. Ladbroke*, 2 Ves. Sen. 591, 594-95, 28 Eng. Rep. 377, 381 (1755) ("Here was a man aged seventy-two, had a dangerous and a flattering distemper [apparently the gout], had a fit of it then," and executed "a will and a deed both at the same time (as it seems), and dies in two days. This is a case as to the custom of a very suspicious nature . . ." and ". . . an act done in illusion of the custom. . .").

³⁰ *Turner v. Jennings*, *supra* note 29.

³¹ Reservation of some "interest" in the property appears to be the basic test. No cases were found involving a large outright transfer (no "interest" being retained) made shortly before death; but the indications are that such a transfer would not prevail against the custom. See *Tomkyns v. Ladbroke*, *supra* note 29, at 595.

³² *City v. City*, 2 Lev. 130, 83 Eng. Rep. 483 (K.B. 1675). In *Ambrose v. Ambrose*, 1 P. Wms. 321, 24 Eng. Rep. 407 (1716), it was held that when *H* bought land in name of *X*, *X* giving declaration of trust after *H*'s death, this defeated the custom of London.

³³ *E.g.*, *Walker v. Walker*, 66 N.H. 390, 392, 31 Atl. 14, 15 (1891); see *Cahn*, "Restraints on Disinheritance," 85 U. PA. L. REV. 139, 153, note 47 (1936). *But see* *Stone v. Stone*, 18 Mo. 389, 393 (1853) (citing *Fonblanque*); *Gentry v. Bailey*, 47 Va. (6 Gratt.) 594 (1850); *Lightfoot v. Colgin*, 19 Va. (5 Munf.) 42 (1813).

But it is doubtful if the case was ever considered authoritative in England. The other cases under the custom stress reservation of possession or interest,³⁴ or the testamentary³⁵ aspect of the transfer. Some of the cases contain dicta inferentially repudiating³⁶ the doctrine in question; and in two cases doubt is expressed as to the accuracy of the reporter of the *City* case.³⁷

Are the precedents under the custom of any value in pondering our latter-day problems, or are they outmoded, to be classed with frankalmoign, deodand, and the high-button shoe? The question merits careful thought, as the determined judicial support³⁸ of the basic protective policy of the custom is in sharp contrast to the legalistic attitude taken by many of the modern decisions on evasions of the statutory share.

The early American courts paid close attention to the case-law under the custom, but there was a division of opinion as to the relevance of that case-law.³⁹ Some courts distinguished

³⁴ *Turner v. Jennings*, 2 Vern. 612, 23 Eng. Rep. 1000 (1708) (court also stresses proportion of estate transferred and proximity to death); *Smith v. Fellows*, 2 Atk. 62, 26 Eng. Rep. 435 (1740); also see *Randall v. Willis*, 5 Ves. Jr. 262, 276, 31 Eng. Rep. 577, 585-86 (1800).

³⁵ *Tomkyns v. Ladbrooke*, 2 Ves. Sen. 591, 28 Eng. Rep. 377 (1755); *Edmundson v. Cox*, 2 Eq. Ca. Abr. 275, 22 Eng. Rep. 233 (1716); *Coomes v. Elling*, 3 Atk. 676, 26 Eng. Rep. 1188 (1747). See also *Fairebeard v. Bowers*, 2 Vern. 201, 23 Eng. Rep. 731 (1690) (confession of judgment payable three months after death).

³⁶ *Hall v. Hall*, 2 Vern. 277, 23 Eng. Rep. 779 (1692); *Coomes v. Elling*, *supra* note 35; *Turner v. Jennings*, *supra* note 34; see the remarks of Macdonald C.B., in *Jones v. Martin*, 3 Anst. 882, 889-90, 145 Eng. Rep. 1070, 1072 (1796) (marriage covenant).

³⁷ *Jones v. Martin*, 3 Anst. 888, 890, 145 Eng. Rep. 1070, 1072 (1796) ("The note in 2 Levins is too loose to be much relied on. . . .") Cf. *Tomkyns v. Ladbrooke*, *supra*, note 35, at 595: "Levinz, though a good lawyer, was sometimes a very careless reporter." The *City* case was referred to, but not followed, in *Smith v. Fellows*, *supra* note 34.

³⁸ *E.g.*, *Tomkyns v. Ladbrooke*, *supra* note 35, at 592. "I must not make a decree to defeat that custom." But it is possible, ironically, that under the custom, as well as nowadays, the key to successful evasion lay in careful draftsmanship: "Indeed if the gift to the wife had been made by the husband to trustees, for the separate use of the wife in possession, this might have been of a different consideration, and I should be inclined to think such gift was good. . . ." *Coomes v. Elling*, 3 Atk. 676, 679-80, 26 Eng. Rep. 1190 (1747).

³⁹ *Compare* *Lightfoot's Ex'rs v. Colgin*, 19 Va. (5 Munf.) 42 (1813),

it on the dubious reasoning that under the custom the widow and children took as creditors.⁴⁰ To be sure, there are some references to the widow and children being in a preferred position as "creditors."⁴¹ For that matter, the widow is similarly designated under some of the American cases.⁴² But dissatisfaction may be found even in the older English cases with the "creditor" analogy;⁴³ and it seems safe to say that the wife and children took their customary shares only after debts had been paid.⁴⁴ Another more plausible theory stressed the more exacting interpretation of the Wills Act to be found in the cases under the custom.⁴⁵ The "testamentary" label would strike down many types of inter vivos transfer in the days of the custom. Whether the courts would be motivated more by concern for the formalities of the Wills Act than for the plight of the family is a moot point.

and Gentry v. Bailey, 47 Va. (6 Gratt.) 594 (1850) with Walker v. Walker, 66 N.H. 390, 31 Atl. 14 (1891).

⁴⁰ *E.g.*, see the various opinions in Lightfoot's Ex'rs v. Colgin, *supra* note 39, at 62, 74-76, 81; *but cf.* the remarks of Brooke, J. at 67.

⁴¹ *Cf.* Faibreard v. Bowers, 2 Vern. 201, 202, 23 Eng. Rep. 731, 732 (1860).

⁴² See *infra*, Chap. 17.

⁴³ "[I]n some cases the child of a freeman is said to be a creditor: but that is only an analogous expression." Tomkyns v. Ladbroke, 2 Ves. Sr. 591, 595, 28 Eng. Rep. 377, 379 (1755).

⁴⁴ Read v. Duck, Prec. Chan. 409, 24 Eng. Rep. 183 (1715).

⁴⁵ *Cf.* the comment in Jones v. Martin, 3 Anst. 888, 890, 145 Eng. Rep. 1070, 1072 (1796), that the custom of London cases "will all be found upon examination to have proceeded on the ground that the bequests were in their nature testamentary, not absolute and irrevocable." For an enlightened approach to the Wills Act today, see Gulliver and Tilson, "Classification of Gratuitous Transfers," 51 YALE L. J. 1 (1941). On the "testamentary" factor in the American cases, see Chap. 7:1.

Some of the cases under the custom involve successful attempts by some of the children to set aside an inter vivos transfer by the father to another child, or to grandchildren, *e.g.*, the *Tomkyns* and *Turner* cases. These cases belong to the "fraud" category, however, and apparently were not considered to be an informal application of the doctrine of advancements, or, more appropriately, satisfaction. An "advancement," under the custom, usually operated to bar any participation in the estate. Many of the "advancement" cases may be found in 2 Eq. Ca. Abr. 263-74, 22 Eng. Rep. 222-32. And see Elbert, "Advancements: 1," 51 MICH. L. REV. 665, 671-73 (1953); Fifoot, HISTORY AND SOURCES OF THE COMMON LAW, TORT AND CONTRACT 30 (1949).

And the cases under the custom may be distinguished on another count. They were decided under an older economy, when interference with inter vivos property transmission would not have the drastic consequences that it has today. The custom of London endured for some six hundred years — roughly from 1100 to 1700. Probably not many gratuitous inter vivos transfers of personalty were made in the early and middle stages of that period. The reported cases that concern evasions all occur within the last century of the custom — most of them in the early eighteenth century. Even under the emergent “market pattern”⁴⁶ of the latter period the total volume of gratuitous alienations would not approach the comparative turnover today. The community would suffer no particular inconvenience from restrictions on a decedent’s relatively infrequent gratuitous inter vivos transfers; and it would be an easy and natural consequence to subordinate the privilege of inter vivos alienation to the claims of the family.

In brief, the harsh inflexible doctrines of the case-law under the custom are ill-suited to modern conditions. As we saw in Part I, *supra*, the same may be said about either the custom of London itself or its modern equivalent, the American statutory share.

⁴⁶ Cf. Polanyi, *THE GREAT TRANSFORMATION*, 56–57 (1944).